

protection to which he is entitled is that his guilt must be proved in accordance with or in a manner required by law. Anything less will not be enough.

After careful consideration we rule that the proper course would be to quash the conviction and set aside the sentence.

We have considered and rejected ordering a retrial since it would be most unjust in the circumstances to put him in jeopardy of his life twice.

The appellant is accordingly acquitted and discharged.

Appeal allowed.

Solicitors: *Ramasamy Suppiah & Co.*

SUPREME FINANCE (M) BHD. v. KOO SIN KEN

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Syed Agil Barakbah S.C.JJ.) October 15, 1986]

[Kuala Lumpur — Supreme Court Civil Appeal No. 101 of 1986]

Practice and Procedure — Rate of interest after date of judgment — R.H.C. 1980, O.42 r. 12.

In this case the respondent the director of a company had charged a piece of land to the appellant as security for a loan to the company. The respondent was to pay the appellant interest at the rate of 18% per annum. It was also agreed that in default of payment of the loan or interest the appellant should be entitled to agreed damages at the rate of 0.685% per day on the sum owing from the date of default until the date of payment. The respondent failed to pay interest for the months of December 1982 to April 1983. The appellant sent the statutory notice under the National Land Code and the respondent was ordered to show cause why his land should not be sold by public auction for the recovery of the amount due that is \$416,633.28 being the principal sum including interest at the rate of 18% per annum as at April 30, 1983 together with further interest at 0.685% per day until December 5, 1983 and thereafter at 8% until the date of full satisfaction. The appellants appealed and contended that they were entitled to the interest of 18% until the date of realization.

Held: the appellants are entitled to retain their security until they are paid the principal sum and specified rates of interest up to the date of judgment but they were not entitled to interest on the judgment debt exceeding the statutory rate of 8% per annum under Order 42 rule 12 of the Rules of the High Court, 1980.

A Cases referred to:

- (1) *American International Assurance Co. Ltd. v. Union Builders (Malaysia) Sdn. Bhd.* [1973] 1 M.L.J. 95.
- (2) *Ex parte Fewings* (1884) 25 Ch. D. 338, 355.
- (3) *Economic Life Assurance Society v. Osborne* [1902] A.C. 147, 149.
- (4) *Public Bank Berhad v. Hara Industries Sdn. Bhd. & Anor.* K.L. Civil Suit No. 7652 of 1985.
- (5) *Sim Lim Finance Ltd. v. Pelandok Enterprises Pte. Ltd. & Anor.* [1981] 1 M.L.J. 280.

B

SUPREME COURT.

C

Loh Siew Cheang for the appellant.
Loh Yew Dong for the respondent.

D

Lee Hun Hoe C.J. (Borneo) (delivering the Judgment of the Court) : We dismissed the appeal and stated we would give our reasons later. We do so now.

E

The only issue in the appeal concerned the rate of interest to be given after date of judgment. The facts were not in dispute. Briefly, Macina Enterprise Sdn. Bhd. (the borrower) obtained a loan of \$392,000.00 from the appellant. As security for the loan the respondent, a director of the borrower, charged to the appellant a piece of land described as C.T. No. 9408 Lot No. 78-N in the Town of Ipoh (the land). The respondent was to pay the appellant interest on the loan at the rate of 18% per annum. It was also provided that in default of the loan or interest the appellant should be entitled to agreed damages at the rate of 0.685% per day on the sum owing from the date of default until the date of payment. The respondent failed to pay interest for the months of December 1982 to April, 1983. Notice recalling the loan was given to the respondent. On June 29, 1983 the appellant sent the respondent the statutory notice in Form 16E pursuant to section 255 of the National Land Code. As on April 30, 1983 the total amount (including interest) outstanding was \$416,653.78. Consequently, the respondent was ordered to show cause why his land should not be sold by public auction for the recovery of the amount due, that is, \$416,633.28 being the principal sum including interest at the rate of 18% per annum as at April 30, 1983 together with further interest at 0.685% per day until December 5, 1983 and thereafter at 8% per annum until the date of full satisfaction.

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In his grounds of judgment the learned Judge stated:-

"The defendant claims that the interest as provided for by the agreement at 18% per annum should only be chargeable

up to the date of judgment. Thereafter the interest should be at 8% per annum.

I agree with the defendant. Interest should be at 8% per annum from the date of judgment until the judgment is satisfied. O.42 r. 12 clearly provides that every judgment debt shall carry interest at the rate not exceeding 8% per annum from the date of judgment. The interest chargeable before and up to the date of judgment could however be at the rate specified in the agreement."

The appellant contended that the learned Judge was wrong in law. He made two submissions. First, what he called the broader approach, that is, section 16(i) of the Courts of Judicature Act, 1964 preserves the contractual rights and does not confer power upon the Rules Committee to interfere with private rights of the parties acquired under contracts. In other words, section 16(1) allows for contractual interest rates to be chargeable on a judgment sum. Secondly, the narrower approach, that is, the merger doctrine has no application to the present case. However, during the hearing the appellant abandoned the broader approach. For the narrow approach he relied on the case of *American International Assurance Co. Ltd. v. Union Builders (Malaysia) Sdn. Bhd.*⁽¹⁾ There the appellants were the chargees of certain lands on the security of which the respondents were given a loan of \$1,250,000.00 bearing interest at 11% per annum. The respondents defaulted in payment of a number of instalments. An order for sale of the lands was made by the High Court to recover the sum of \$1,401,596.24 due to the appellants as on August 31, 1970 together with interest at 11% per annum from September 1, 1970 to date of order and further interest at 6% per annum to date of payment or realization. The appellants appealed against the order of the High Court in so far as it related to the payment of interest at 6% from the date of the order. They claimed interest at 11% per annum until the date of realization of the security. In allowing the appeal the Federal Court held that as the appellants' claim as chargees in this case was not on the covenant but in the exercise of their statutory remedy against a chargor in default there could not be any merger in the judgment and the appellants were therefore entitled to the interest at the agreed rate, that is, 11% until realization of the security.

The Federal Court apparently disapproved the award of the lesser interest from the date of the order by the learned judge because he chose to follow *Ex parte Fewings*⁽²⁾ where Fry L.J. stated:-

"When there is a covenant for the payment of a principal sum and a judgment has been obtained upon the covenant for that sum, it is plain that the covenant is merged in the

A judgment, and, if there is a covenant to pay interest which is merely incidental to the covenant to pay the principal debt, that covenant also is merged in a judgment on the covenant to pay the principal debt. Of course a covenant to pay interest may be so expressed as not to merge in a judgment for the principal; for instance, if it was a covenant to pay interest so long as any part of the principal should remain due either on the covenant or on a judgment."

B The above passage was quoted with approval by the Earl of Halsbury L.C. in *Economic Life Assurance Society v. Osborne*.⁽³⁾ Ong C.J. (Malaya) in his judgment in the *American International Assurance case*⁽¹⁾ was critical of the above passage for he thought that it did not, perhaps, sufficiently clarify the distinction between a debt and a claim upon a mortgage. In all the cases referred to the question of statutory rate of interest was never discussed. O.42 r.12 reads:-

D "12. Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the Court directs, such interest to be calculated from the date of judgment until the judgment is satisfied."

E There is no equivalent English rule. The question is whether the debt merged in the judgment. Clearly, where a judgment is recovered in respect of a debt any other personal remedy for the same debt is extinguished or merged in the judgment. In which case under O.42 r.12 the interest will be at the rate of 8% per annum or such other rate not exceeding 8% per annum as the Court directs from the date of judgment until satisfaction. O.42 r.12 makes no distinction between debts in respect of which the parties have made an agreement in respect of interest and those where there is no such agreement. Bearing in mind that, after judgment, the judgment creditor enjoys the privilege of having the assistance of the courts in enforcing the judgment or he may initiate bankruptcy proceedings. Without obtaining judgment a judgment creditor cannot do either of these.

H It is interesting to note that the question of rate of interest was discussed in some details by V.C. George J. in the unreported case of *Public Bank Berhad v. Hara Industries Sdn. Bhd.*⁽⁴⁾ An instructive case is *Sim Lim Finance Ltd. v. Pelandok Enterprises Pte. Ltd. & Anor.*⁽⁵⁾ where Wee Chong Jin C.J. (Singapore) had to construe O.42 r. 12 of the Rules of the Supreme Court which is word for word the same as our O.42 r.12. In that case the plaintiffs sued the defendants for monies advanced to the first defendant under a mortgage. They applied for leave to enter judgment under O.83 r.4 against the first defendant in default of appearance for \$1,755,691.90 and interest at the rate of

\$1,024.14 per day from October 1, 1980 until payment. The Registrar heard the application and entered judgment for the sums claimed and interest at the rate claimed from October 1, 1980 until the date of judgment and thereafter at 8% per annum. The appellants appealed claiming that they were entitled to interest at the rate claimed until payment. In dismissing the appeal Wee Chong Jin C.J. (Singapore) held that although the plaintiffs were entitled to retain their security until they were paid the principal sum and interest at 18% per annum (the covenanted rate) they were not entitled under the present application for leave to enter judgment in default of appearance to interest on the judgment debt exceeding the statutory rate of 8% per annum prescribed under O.42 r.12. Has the courts power to award interest above the statutory rate of 8% per annum as prescribed under O.42 r.12? Section 16 of the Courts of Judicature Act, 1964 is an enabling provision giving power to the Rules Committee to make rules relating to various matters. As to interest the Rules Committee has by O.42 r.12 prescribed interest for judgment debt at maximum rate of 8% per annum.

We are also of the view that the appellants are entitled to retain their security until they were paid the principal sum and specified rates of interest up to the date of judgment but they were not entitled to interest on the judgment debt exceeding the statutory rate of 8% per annum under O.42 r.12. We see no reason to interfere with the decision of the learned judge. Hence we dismissed the appeal with costs.

Appeal dismissed.

Solicitors: *Joseph Tan & Tang; Loh Yew Dong & Co.*

DIRECTOR-GENERAL OF INLAND REVENUE v. TAY CHEE MING

[S.C. (Seah, Mohamed Azmi & Wan Hamzah S.C. JJ.)
October 17, 1985 & October 17, 1986]

[Kota Kinabalu — Supreme Court Civil Appeal
No. 218 of 1985]

Revenue Law — Income Tax — Sale of land — Isolated transaction — Whether adventure in the nature of trade — Deciding Order of Special Commissioners — Form of — Income Tax Act, 1967, ss. 2(1), 4(a) & Schedule 5.

In this case the respondent and his wife had transferred their land to a development company and they made a

A gain of \$479,000. The Director-General of Inland Revenue contended that the gain was from an adventure in the nature of trade and he raised an assessment of income tax of \$268,007 on that gain. The respondent contended that it was not a gain from an adventure in the nature of a trade but was a capital gain not assessable to tax. The Special Commissioners dismissed his appeal. He further appealed to the High Court and the learned Judge allowed his appeal and set aside the Deciding Order of the Special Commissioners. The Director-General of Inland Revenue appealed.

C Held: (1) the Special Commissioners in this case had not considered the issue stated in the agreed facts and submitted for their determination. Instead they pronounced a decision on an issue raised by them which was not a real issue in the case. As they had not considered the real issue but misconceived issues their decision should be set aside as being inapplicable;

D (2) the facts of the case do not show that the respondent had acquired the subject land because of its potential value with the intention of reselling it at an enhanced price. Nor do the facts show that the respondent spent money or took other steps to improve the land to enhance its value after he had acquired it. The facts showed that the enhancement of the value of the land, if any, was not the result of anything done by the respondent for the purpose of resale;

E (3) the respondent's dealing with the land was not an adventure in the nature of trade and the appeal should therefore be dismissed;

F (4) the Deciding Order of the Special Commissioners should state the decision and order to confirm or discharge the assessment or to direct that the assessment be amended and to specify the amendments or to require the amendments to be determined by agreement between the parties. The grounds of decision should be put up separately from the deciding order.

Cases referred to:

- (1) *Rutledge v. C.I.R.* 14 T.C. 490.
- (2) *C.I.R. v. Livingston* 11 T.C. 538.
- (3) *T.C.S. v. Director-General of Inland Revenue* [1977] 2 M.L.J. 212.

SUPREME COURT.

Abdul Hamid bin Haji Mohamad (Senior Federal Counsel) for the appellant.

H *S. Woodhull* (*Thomas Chia* with him) for the respondent.

Cur. Adv. Vult.

I *Wan Hamzah S.C.J.* (delivering the Judgment of the Court): The Director-General of Inland Revenue (hereafter referred to as the Revenue) contended that when Tay Chee Ming (hereafter referred to as Tay) and his wife transferred their land held under Country Lease No. 30085 (hereafter referred to as the subject land) to Ming Huat